STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: W. Michael Nawrath, Esq.
PRB File No. 2014-030, 2014-099,
2014-154, 2014-158 & 2014-167

Decision No. 169 – CORRECTED DECISION

On or about September 27, 2016, Disciplinary Counsel filed a Petition of Misconduct with the Professional Responsibility Board. Pursuant to A.O. 9, Rule 14(A), Respondent was served with a copy of the Petition by certified mail, restricted delivery and return receipt requested. Respondent received and signed for the Petition on September 23, 2016.

Rule 11(D)(3) requires a respondent to serve an answer within 20 days after the service of the petition, unless an extension is granted by the chair of the hearing panel. Respondent did not request any extension of time for the filing of an answer. The 20-day period for Respondent to file his answer expired on October 13, 2016.

On or about October 26, 2016, Disciplinary Counsel filed a Motion to Deem Charges Admitted pursuant to Rule 11(D)(3). Rule 11(D)(3) provides, in pertinent part, that "[i]n the event the respondent fails to answer within the prescribed time, the charges shall be deemed admitted, unless good cause is shown." The respondent, W. Michael Nawrath, Esq., did not file a response to the Motion or ask to be heard on the motion.

On November 29, 2016, the Hearing Panel granted Disciplinary Counsel's Motion to Deem Charges Admitted, concluding that the charges should be deemed admitted in the absence of any showing of good cause to conclude otherwise, and the Hearing Panel issued Findings of Fact and Conclusions of Law adjudicating multiple violations of the Vermont Rules of Professional Conduct. The Hearing Panel issued a separate Scheduling Order setting forth a

briefing schedule for the parties to submit memoranda on the issue of sanctions. In addition, the Order required Disciplinary Counsel and Respondent, respectively, to notify the Professional Responsibility Program Administrator if they wished to be heard on the issue of sanctions. The Order stated that "[i]f a written request for hearing is not received within the times provided [in this Order], the Hearing Panel shall conclude that the parties have waived their right to hearing and proceed with issuing a decision on the question of sanctions based up the parties' respective filings." *Id.* ¶ 5.

On December 9, 2016, Disciplinary Counsel file a Sanctions Memorandum and indicated that she waived her right to a hearing regarding sanctions. The Scheduling Order required Respondent to notify the Program Administrator on or before December 30, 2016 as to whether he wished to be heard on the question of sanctions and to file any responsive memorandum. To date, Respondent has not requested a hearing on sanctions or filed any responsive memorandum.

The Hearing Panel hereby reaffirms its previous Findings of Fact and Conclusions of Law and concludes for the reasons set forth below that disbarment is the appropriate sanction in this case.

FINDINGS OF FACT

At all times relevant hereto, W. Michael Nawrath, of Manchester Center, Vermont has been an attorney licensed to practice law in the State of Vermont. Respondent has held a Vermont law license since 1981. His law license has been on interim suspension status since March 14, 2014, by order of the Vermont Supreme Court. The facts for each charge are separately described below.

PRB No. 2014-030

Respondent represented the Village of Manchester in connection with a lawsuit filed against the Village by the Estate of Marie Hodges (Docket No. 100-3-12 Bncv). Respondent allowed a default judgment to be entered against his client due to Respondent's failure to act. Respondent misrepresented the status of the matter to his client. Respondent told the client the claim against it had been dismissed, misrepresenting the actual status of the case. Respondent failed to keep the Village reasonably informed about the status of the matter.

A disciplinary complaint was filed against Respondent concerning Respondent's representation of the Village. On August 28, 2013, Bar Counsel Michael Kennedy requested that Respondent send a response to the complaint by September 13, 2013. Respondent did not respond. On September 17, 2013, Bar Counsel's office followed up with another letter to Respondent, giving him until September 24, 2013 to file a response. Respondent did not respond. On October 4, 2013, Disciplinary Counsel sent a letter to Respondent by certified mail, with a copy by regular mail, requesting a response to the complaint. Respondent did not file a response or otherwise contact Disciplinary Counsel. Disciplinary Counsel also telephoned Respondent on October 4, 2013, and left him a message asking him to get in touch with Disciplinary Counsel. Respondent did not respond to the message.

PRB No. 2014-099

Respondent represented Somerset Development Corp., which was the defendant in the action titled *Glen Owner's Association, Inc. v. Somerset Development Corp.*, Docket No. 104-3-13 Bncv. Respondent failed to cooperate with opposing counsel on a proposed scheduling order and ADR stipulation. Respondent also failed to appear in front of Judge Wesley at the status conference which the Court scheduled to address Respondent's failure to cooperate with the

preparation of the scheduling order and ADR stipulation. After the status conference, the Judge issued an order requiring Respondent to file a written explanation providing good cause for Respondent's failure to participate in the scheduling process. The Judge warned Respondent that failure to comply could result in default judgment being entered against his client. Respondent did not file the written explanation, as ordered by the Court. Default judgement was entered against his client. Respondent subsequently failed to notify his client about the default judgment.

A disciplinary complaint was filed against Respondent as a result of his conduct in the litigation. On November 25, 2013, Disciplinary Counsel wrote to Respondent and requested a response to the complaint by December 16, 2013. Respondent did not respond.

PRB No. 2014-154

Respondent's former client, Marian Haines, of Manchester Center, Vermont requested her file from Respondent. Ms. Haines made multiple telephone calls to Respondent's office and sent Respondent two certified letters requesting her file. Respondent received Ms. Haines' letter because he signed for her certified letter. Ms. Haines also drove by Respondent's office multiple times looking for him, but never saw his car at the office. Over the course of six months Ms. Haines attempted to get in touch with Respondent so she could get her file. Respondent failed to return Ms. Haines' client file to her after she requested it by certified mail.

A disciplinary complaint was filed against Respondent. On February 4, 2014, Bar Counsel requested a response to the complaint by February 14, 2014. The letter was sent by certified mail, with a copy by regular mail. Respondent did not respond.

PRB No. 2014-158

Respondent prepared a Will for Dorothy O'Brien, which she executed. Respondent told Mrs. O'Brien and her adult son, Mark O'Brien, that the original Will would be placed in a safe

deposit box at the Bank of Bennington for safekeeping. Later, Mrs. O'Brien wanted to retrieve her original Will. She and her son made multiple efforts to contact Respondent, to ask him for the original Will, but they could not get in touch with him by email or telephone.

Mr. O'Brien personally went to Respondent's office, when he was in Vermont on a visit. Respondent's office was empty and had a "For Sale" sign out front. Mrs. O'Brien and her son contacted the Bank of Bennington, but the bank could not provide them any information about the safety deposit box that Respondent may or may not have rented to keep Mrs. O'Brien's Will. Despite their efforts, Mrs. O'Brien was unable to get her original Will back from Respondent.

A disciplinary complaint was filed against Respondent. On February 6, 2014, Bar Counsel sent Respondent a letter by regular mail and email, informing him of Mr. O'Brien's complaint and asking him to contact Disciplinary Counsel immediately. Respondent did not respond.

PRB No. 2014-167

Respondent represented clients in an Environmental Court matter entitled *Natural Resources Board v. Donald Dorr, Inc.*, Docket No. 49-4-13 Vtec. Respondent filed a notice of appeal of the Environmental Division's decision to the Vermont Supreme Court. Respondent failed to file a docketing statement and a transcript request in that appeal, as required by the Vermont Rules of Appellate Procedure. The Supreme Court dismissed the clients' appeal.

Respondent did not keep the clients informed about the status of their case, and did not inform them that their appeal had been dismissed. The clients retained new counsel, who attempted to get the clients' appeal reinstated. The clients' new counsel obtained a sworn affidavit from Respondent to support counsel's request to reinstate the appeal. In Respondent's

affidavit Respondent admits Respondent failed to take appropriate action on behalf of these (and other) clients and failed to keep his clients reasonably informed about their legal matters.

A disciplinary complaint was filed against Respondent. On February 19, 2014, Bar Counsel wrote to Respondent about the matter and instructed him to respond to Disciplinary Counsel immediately. Respondent did not respond.

Failure to Cooperate

On March 28, 2016, Disciplinary Counsel called Respondent and reached him on the telephone. Disciplinary Counsel requested, and Respondent agreed to provide a current bank statement for Respondent's IOLTA account and Respondent's client ledger sheets for the account. Respondent did not honor his promise and did not provide the requested documents.

Respondent ignored a confirmatory email from Disciplinary Counsel sent March 28, 2016; a letter sent to Respondent on March 29, 2016 by regular mail; a letter sent to Respondent on April 15, 2016 by regular mail; and a letter sent to him on May 3, 2016, by regular mail.

CONCLUSIONS OF LAW

As described above, Respondent violated Rule 1.3 of the Vermont Rules of Professional Conduct by failing to act diligently and promptly while representing clients. More specifically, Respondent's violations of Rule 1.3 include the following conduct:

(1) Respondent's failure to timely file a responsive pleading resulted in default judgement being entered against his client, the Village of Manchester;

(2) Respondent's failure to comply with an order of Judge Wesley resulted in the Judge entering default judgment against Respondent's client;

(3) Respondent did not respond to a former client's numerous requests for the client's file over the course of many months; and

(4) Respondent's failure to comply with the Appellate Rules of Procedure resulted the Supreme Court dismissing his client's appeal.

Respondent violated Rule 1.4 of the Rules of Professional Conduct by failing to communicate with clients and keep them reasonably informed about their legal matters. Respondent's violations of Rule 1.4 include the following conduct:

(1) Respondent's failure to inform the Village of Manchester that default judgment had been entered against the Village due to Respondent's errors.

(2) Respondent misrepresented the status his client's pending court matter to his client, the Village. Respondent did not inform his client, Somerset Development Corp., that default judgment had been entered against the client as a result of Respondent's failure to comply with the Court's direct order.

(3) Respondent failed to inform his clients that their appeal to the Vermont Supreme Court had been dismissed due to Respondent's failure to comply with the procedural Rules.

Respondent violated Rule 1.16(d) of the Rules of Professional Conduct by failing to return documents, papers, or files to Respondent's clients. Specifically, Respondent did not respond to Ms. Haines numerous requests, over a period of six months, for her file. In addition, Respondent did not respond to Mrs. O'Brien's request for her original Will.

Respondent violated Rule 7(D) of Administrative Order 9 by failing to furnish information to, or respond to requests from, Disciplinary Counsel without reasonable grounds for such refusal. In each of the cases cited above, either Disciplinary Counsel or Bar Counsel requested Respondent respond to one or more allegations of misconduct. In a couple of these matters, several requests were made. Disciplinary Counsel and Bar Counsel tried to

communicate with Respondent by mail, email, and telephone, but Respondent was repeatedly unresponsive.

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625,626, 925 A.2d 1026, 1028 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, __ Vt. __, 145 A.3d 226, 231 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)); *see also Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (*"ABA Standards"*), Purpose and Nature of Sanctions, § 1.1 at 19 ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.").

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing Panels are guided by the *ABA Standards* when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

> When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 513, 857 A.2d 803, 807 (mem.).

"Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction. See V.R.Pr.C., Scope (explaining that severity of sanction 'depend[s] on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations'). This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors." *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 487, 22 A.3d 461, 473–74 (2011). Accordingly, the Hearing Panel has employed the *ABA Standards* as a tool to determine the appropriate sanction in this case.

The Duty Violated

"In determining the nature of the ethical duty violated, the [ABA] standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*." *ABA Standards*, Theoretical Framework, at 5 (emphasis in original). Respondent violated the following duties: under Rule 1.3 of the Vermont Rules of Professional Conduct, the duty to act "with reasonable diligence and promptness" in the course or representing the client; under Rule 1.4, the duty to communicate promptly with his or her clients and to keep them reasonably informed about their legal matters; and under Rule 1.16(d), the duty to return papers or property to a client upon termination of the representation.[1]

[1] Respondent also violated – in addition to his duties under the Rules of Professional Conduct – the duty set forth in A.O. 9, Rule 7(D) to respond to a request by Disciplinary Counsel for information. Under Rule 7(D), discipline may be imposed for failing to respond to such a request "without reasonable grounds for doing so." Because the lawyer's duties considered in the *ABA Standards* are limited to those set forth in the Rules of Professional Conduct, the Hearing Panel does not consider the violation of Rule 7(D) in its analysis and application of the *ABA Standards*. Moreover, in light of the Panel's conclusion that the most severe sanction, disbarment, is the appropriate sanction for Respondent's violations of the Rules of Professional Conduct, any additional sanction that might be imposed for the Respondent's violation of Rule 7(D) need not be addressed.

Mental State

The second factor to be considered is the lawyer's mental state. "The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. The term "intent" is defined as "the conscious objective or purpose to accomplish a particular result;" the term "knowledge," as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result;" and the term "negligence," as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*, Black Letter Rules and Commentary, Definitions, at 19.

The distinction between "knowing" and "negligent" misconduct has been explained as follows: "[W]as the lawyer aware of the circumstances that formed the basis for the violation? If so, the conduct was done knowingly. If the lawyer instead acted without awareness, but below the accepted standard of care, then he acted negligently. Application of these definitions is fact-dependent." *In re Fink*, 2011 VT 42, ¶ 38. Moreover, "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *Id.*

In this case, because Respondent failed to answer the charges in the Petition of Misconduct and as a result the charges have been deemed admitted, the only facts before the Hearing Panel are those set forth in the Petition. A finding of knowing misconduct may not be based upon a conclusion that a respondent should have known that certain results adverse to the client would likely follow from his or her acts or omissions. "In the context of sanctions . . . knowing conduct does not encompass both knew or should have known." *Id.* ¶ 38.

Based on the Petition alone, the Hearing Panel is unable to find that the Respondent knew of the circumstances forming the basis for the violations. Accordingly, the Hearing Panel finds and concludes, for purposes of determining the appropriate sanction, that Respondent's mental state was one of negligence.

Injury and Potential Injury

The *ABA Standards* require the Hearing Panel to consider "the actual or potential injury caused by the lawyer's misconduct." *Id.* § 3.0(c), at 26. Under the *ABA Standards*, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *ABA Standards*, Theoretical Framework, at 6.

Respondent's misconduct resulted in a default judgment being entered against one client, the Village of Manchester (PRB No. 2014-030) and against another client, Somerset Development Corp., in a separate action (PRB No. 2014-099). In a third proceeding, a Supreme Court appeal filed by Respondent, the appeal was dismissed based on Respondent's failure to file a docketing statement and transcript request (PRB No. 2014-167). These adverse results constituted actual injury to Respondent's clients.

Respondent's failure to return a client's file to her (PRB No. 2014-154) caused the client to have to make repeated requests of Respondent and to make trips to Respondent's office in an unsuccessful attempt to recover the file. Likewise, his failure to respond to requests by another client for an original Will that Respondent had prepared for her (PRB No. 2014-158) caused the client to have to make repeated inquiries in an attempt to recover the Will. These violations cause injury to the public at large by "decreas[ing] public confidence in the profession." *In re Fink*, 2011 VT 42, ¶ 36.

Presumptive Standard under the *ABA Standards*

The *ABA Standards* set forth presumptive sanctions for violations of various duties that are owed to the client, including sanctions "in cases involving a failure to act with reasonable diligence and promptness in representing a client." *Id.* § 4.4. The standard in § 4.41 states that:

> [d]isbarment is generally appropriate when:
>
> (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
>
> (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
>
> (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Id. § 4.41.

The Commentary to § 4.41 states that:

> [l[]ack of diligence can take a variety of forms. Some lawyers simply abandon their practices, leaving clients completely unaware that they have no legal representation and often leaving clients without any legal remedy. Other lawyers knowingly fail to perform services for a client, or engage in a pattern of misconduct, demonstrating by their behavior that they either cannot or will not conform to the required ethical standards.

Id. § 4.41, Commentary, at 34.

In addition, the *ABA Standards* state that when there are multiple instances of misconduct, "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations . . . ." *Id.*, Theoretical Framework, at 7.

The Hearing Panel concludes, under the standard in § 4.41(a) or in the alternative under the standard in § 4.41(c), that the presumptive sanction for Respondent's misconduct is disbarment. The facts presented show that Respondent abandoned his law practice, resulting in

serious injury to multiple clients. Disbarment is appropriate under such circumstances. *See, e.g.*, *In re Joy*, 158 Vt. 646, 649-50, 605 A.2d 850, 853 (1992) (affirming recommendation of disbarment based on § 4.41 where respondent abandoned her client). Alternatively, Respondent engaged in a pattern of neglecting his clients that justifies disbarment. His neglect encompassed multiple failures to represent his clients diligently in connection with litigation and repeated failures to respond to inquiries from his clients. Moreover, the entry of default judgment in two actions and dismissal of a Supreme Court appeal in a third action constituted serious injury to his clients' interests. Under these circumstances, the standard in § 4.41 applies. Disbarment is the presumptive sanction.

Aggravating and Mitigating Factors Analysis

Having concluded that disbarment is the presumptive sanction that applies in this case, the Hearing Panel must consider any aggravating and mitigating factors and whether they call for any adjustment of the presumptive sanction. Under the *ABA Standards*, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standards*, § 9.21, at 50. Mitigating factors are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Id.* § 9.31, at 50-51.

(a) Aggravating Factors

Section 9.22 of the *ABA Standards* sets forth a list of aggravating factors that should be considered. *Id.* § 9.22, at 50. The following aggravating factors are present.

- § 9.22(a) (prior disciplinary offenses) – Respondent has one prior disciplinary adjudication on his record. *See In re: Nawrath*, 170 Vt. 577 (2000) (approving PRB Decision No. 136). The Professional Conduct Board determined that

Attorney Nawrath had, in several instances, neglected a legal matter entrusted to him by a client, in violation of DR 6-101(A)(3).

- § 9.22(c) (a pattern of misconduct) & § 9.22(d) (multiple offenses) – The *ABA Standards* state that "[e]ither a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors." *ABA Standards*, Theoretical Framework, at 7. Respondent failed to exercise appropriate diligence in connection with multiple lawsuits and failed to respond to inquiries from his clients on multiple occasions, resulting in a pattern of misconduct and multiple violations.
- § 9.22(i) (substantial experience in the practice of law) – Respondent was licensed to practice law in 1981, and had been practicing for more than 30 years at the time of the violations.

(b) Mitigating Factors

Respondent did not defend against the disciplinary charges and therefore presented no evidence or argument relating to mitigating factors.

On its own initiative, the Hearing Panel considers whether and, if so, how the mitigating factor of "remoteness of prior offenses" under § 9.32(m), *id.* at 51, should apply in this case in relation to the aggravating factor of "prior disciplinary offenses" under § 9.22(a). The prior disciplinary action against Respondent occurred in 2000 – approximately 14 years before the misconduct that is the subject of this disciplinary proceeding. The Panel concludes that the prior discipline is remote in time. However, because the prior discipline involved similar misconduct – the repeated neglect of client matters – the Panel concludes that the prior discipline should be given some, though not substantial, consideration as an aggravating factor.

The remoteness in time has the effect of lessening the Panel's reliance on, but not negating, the prior offense as an aggravating factor. *See In re Fink*, 2011 VT 42, ¶¶ 44-45 (concurring in the hearing panel's decision "[not to] give significant weight to respondent's prior [discipline] because this violation was remote").

(c) Aggravating Factors Outweigh Mitigating Factors

The pattern of misconduct and multiple instances of misconduct on the part of Respondent and the Respondent's substantial experience in the practice of law – more than 30 years of experience as an attorney – are aggravating factors. Respondent's prior offense constitutes a lesser aggravating factor due to its remoteness in time. The remoteness in time of the prior offense has no bearing on the other aggravating factors. In conclusion, consideration of the *ABA Standards'* aggravating factors and mitigating factors does not call for any adjustment of the presumptive sanction of disbarment.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that Respondent, W. Michael Nawrath, violated V.R.Pr.C. Rules 1.3, 1.4, and 1.16(d) and A.O. 9, Rule 7(D), as set forth above, and that Respondent is disbarred from the office of attorney and counselor at law effective from the date of his interim suspension from the practice of law on March 14, 2014.[2]

[2] The original decision in these proceedings was issued on August 21, 2017. This superseding opinion revises the Order section of the decision due to an oversight in the drafting process. *See* A.O. 9, Rule 16(B) (incorporating the Vermont Rules of Civil Procedure) and V.R.C.P. 60(a) (allowing for correction of errors in orders "arising from oversight or omission").

Dated: August 30, 2017.

Hearing Panel No. 3

By: _____
Sheila Ware, Esq., Chair

By: _____
Jeffrey S. Marlin, Esq.

By: _____
Kevin O'Donnell, Public Member